that circumstance which goes so far as to throw this obligation upon the heiress of entail in the present case, because the succession of the testator here is to be regulated not by the rules of intestate succession, but by his own personal declaration. It appears to me, my Lords, that the part of his trust-deed in which he appoints the trustees to realise his other estate, heritable and moveable, and fulfil and discharge the obligations contained in the marriage-contract between him and his wife, clearly ascertains that the fund out of which not only his legacies and donations were to be paid, but also the provisions of the marriage-contract between him and his spouse were to be defrayed, was his moveable succession or residue; indeed the very character of the residue seems to me to impose the obligation that is here mentioned upon that part of his succession. I am, therefore, of opinion that the Lord Ordinary's Interlocutor, which deals with that question—and that question alone, is a right decision. He finds that according to the true construction of the disposition and settlement the free yearly annuity of £400 provided to Mrs Isabella Gordon, the widow of the said Francis Gordon, by the ante-nuptial contract of marriage entered into between them, of date 1st and 4th September 1826, in primarily a burden upon the residue of the trust-estate of the said Francis Gordon other than the lands of Kincardine O'Neil, and the other lands specified and described in his trust-disposition and settlement, and thereby directed to be entailed. And accordingly, he sustains the first claim stated for Mrs Scott and her curator *ad litem*, and repels the first and second claims stated for the other claimants, her sisters, reserving all questions of expenses, and appoints the cause to be put to the roll with a view to further procedure. That I suppose is for the decision of those minor points which are not now before your Lordships. In my humble opinion we ought to adhere to the Lord Ordinary's interlocutor.

Lords Cowan and Neaves concurred.

Lord Justice Clerk—That is the judgment of the Court. We adhere, and the case will go back to the Lord Ordinary.

The Court gave expenses since the date of the Lord Ordinary's interlocutor.

Counsel for Miss Johnstone Gordon, &c.—Solicitor-General (Clark), Q.C., Millar, Q.C., and Adam. Agents—Mackenzie & Kermack, W.S.

Counsel for Mrs Scott and her Curator *ad litem*—Lord Advocate (Young), Q,C., and M'Laren. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Truster's Widow and the Trustees—W. A. Brown. Agents—Richardson & Johnston, W.S.

Thursday, January 16.

SECOND DIVISION.

[Lord Gifford, Ordinary.

LOCALITY OF KILMORACK—CAMERON *v.* CHISHOLM-BATTEN.

Teind—Surrender.

Where an heritor had obtained a valuation of his teinds, but for a period of more than forty years prior to the decree of valuation had paid a sum above the amount of the valuation—*held* entitled to surrender the valued teind, and liable to pay no more than the valuation.

Previous to 1863 the lands of Aigas were held with the teinds unvalued. In 1817 these lands had been localled upon for stipend to the minister for £40, being one-fifth of the proven rental of the lands; and this sum was paid as stipend by the heritor for forty years afterwards. In 1863 Mrs Chisholm-Batten obtained a decree of valuation of her teinds in absence, the same being valued at £32, 2s. 6d. four-fifths per annum; and the said decree stands unreduced. For some years after the valuation the minister accepted the valued teinds, but he says he was unaware of his rights; and in 1868 he raised an action for the full sum of £40 allocated in 1817, and in this he was successful. The Court held, that notwithstanding the valuation, and notwithstanding a conditional reduction of the locality following thereon, the old locality of 1817 must subsist as a rule of payment till the settlement of a new locality.

In these circumstances a new process of augmentation, &c., was brought on 28th January 1867, in which the present final locality is being settled, and the question is for what sum Mrs Chisholm-Batten's lands should be localised upon in the final locality in this process. Mrs Chisholm-Batten has surrendered her valued teinds, and she insists that she should not be localled upon to any greater extent. The minister objects to this surrender, and maintains that in respect of prescriptive payment Mrs Chisholm-Batten must still be localised on for £40, notwithstanding the decree of valuation.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 12*th November* 1872.—The Lord Ordinary having heard parties' procurators on the question between Mrs Chisholm-Batten of Aigas and her husband and the Reverend Donald Cameron, and having considered the record closed between the said parties on 24th May last, decreet of valuation founded on by Mrs Chisholm-Batten, and whole process,—Sustains the revised condescendence and surrender for the said Mrs Chisholm-Batten and her husband of the whole teinds, parsonage, and vicarage, of her whole lands, embraced in the decreet of valuation of 19th March 1863, amounting, the said valued teinds now surrendered, to the annual sum of £32, 2s. 6d. four-fifths of a penny, all conform to said decreet of valuation and revised surrender, No. 47 of process: Finds that, in respect of said lands and of the surrender of teinds now sustained, Mrs Chisholm-Batten and husband fall to be allocated upon in the final locality now being made up, only for the said sum of £32, 2s. 6d. four-fifths of a penny sterling, being the valued teind of her said lands, and remits to the Clerk to rectify the locality accordingly: Finds Mrs Chisholm-Batten and husband entitled to expenses in the present question, but subject to modification; and remits the account thereof when lodged to the Auditor of Court to tax the same, and to report.

"*Note.*—The circumstances of this case are in some respects peculiar, and the point raised does not seem to be governed by any reported case, or by any authority precisely applicable.

"Previous to 1863 the lands of Aigas and others,

now belonging to the condescender Mrs Chisholm-Batten, were held with the teinds thereof unvalued.

"In 1817, by final decree of modification and locality, these lands were localled upon for stipend to the minister to the extent of £40 per annum, which appears to have been one-fifth of the proven rental of the said lands, or rental upon which the then heritor was held confessed. This sum of £40 per annum was paid by the heritor as stipend under this decree of locality for more than forty years. At least this is the allegation of the minister, and the Lord Ordinary, for the purposes of the present judgment, holds this to be the case. He will afterwards advert to the exception founded upon the minority of former proprietors.

"In 1863, however, Mrs Chisholm-Batten led a valuation of the teinds of the said lands. The present minister, who was then presentee to the parish, was called as a party to this action, but did not appear, and no appearance was made for any one. After a proof in absence, decree of valuation was pronounced in common form on 19th March 1863, valuing the whole teinds of the lands at £32, 2s. 6⅘d. per annum. This decree of valuation stands unchallenged and unreduced. For some years after the valuation the minister seems to have accepted the valued teind, £32, 2s. 6⅘d. per annum, being, as he avers, unaware of his rights; but in 1868 the minister raised action for the full sum of £40 allocated by the final decree of locality of 1817, and in this action the minister was successful. See this case reported 24th February 1869, 7 Macph. 565. The Court held that, notwithstanding the valuation, and notwithstanding a conditional reduction of the locality following thereon, the old locality of 1817 must subsist as a rule of payment until the new locality was settled. The decree of reduction pronounced in 1863 expressly bore that the 'said decree of locality must stand, continue, and endure, as the interim rule of payment of the minister's stipend, aye and until a new decree of locality is obtained, and an extract thereof delivered to the minister at the pursuer's expense.'

"So standing circumstances, the present new process of augmentation, modification, and locality was brought on 28th January 1867, in which the present final locality is now being settled, and the question is for what sum shall Mrs Chisholm-Batten's lands be localled upon in the final locality in the present process. Mrs Chisholm-Batten has raised the question quite distinctly by seeking to surrender as her valued teind the annual sum of £32, 2s. 6⅘d., and she insists that she cannot be localled upon to any greater extent. The minister objects to this surrender, and maintains that in respect of prescriptive payment Mrs Chisholm-Batten must still be localled on for £40 per annum, notwithstanding her decree of valuation.

"The present question relates solely to the final locality, for the Lord Ordinary has already decided, by judgment dated 25th July 1872, that Mrs Chisholm-Batten must continue *ad interim* to pay the £40 till the final locality is settled.

"*Prima facie*, an heritor who has obtained a valuation of his teinds is entitled to surrender the valued teind, and can be asked to pay no more than the amount of the valuation. It rests with the minister to show why Mrs Chisholm-Batten, who in 1863 had her whole teind duly valued at £32, 2s. 6⅘d., should continue in all time coming to pay nearly £8 more, or £40 in all.

"The minister accepts this *onus*, and founds his claim on the allegation that under the final decree of 1817, which stood unreduced till 1863, and, at at all events for a period of more than forty years, Mrs Chisholm-Batten and her predecessors paid £40 per annum, and he maintains that in virtue of the long prescription Mrs Batten must continue liable for that sum, whatever the valuation of her teinds may be. In support of his plea the minister refers to cases in which, notwithstanding old decrees of valuation, heritors have been found liable in prescriptive overpayments—the chief case being that of *Madderty*, 9th July 1817, F. C., 371. See this case and cases there referred to. Also *Baird* v. *The Minister of Polmont*, 3d July 1832, 10 S., 752. A judgment of the present Lord Ordinary in the *Locality of Row*, dated 4th July 1871, was also referred to, in which effect was given to prescriptive overpayment. In this case the present Lord Ordinary fully considered the whole question, and all the authorities, and his judgment was acquiesced in.

"In all these cases, however, the prescriptive overpayments founded on followed the decree of valuation. That is to say, an heritor holding a decree of valuation of the High Court, and which therefore could not be derelinquished by overpayment, paid notwithstanding in excess of the valuation for the full prescriptive period. The Lord Ordinary, as at present advised, continues to be of opinion that the minister and benefice may by prescription obtain an indefeasible right to such overpayment, the same being in reality a payment out of stock over and above the valued teind.

"It humbly appears to the Lord Ordinary, however, that such cases have no application whatever to the present case, where the alleged prescriptive overpayment did not follow upon, but preceeded, the final and unchallengeable decree of valuation.

"It is indeed a mistake in the present case to say that there was any overpayment at all. The payment of the £40 a-year was not an overpayment, it was a fifth of the proven rental—that is, it was the exact amount of the unvalued teind, and it was paid as such. There was no room for maintaining overpayment until 1863, when the teinds were valued for the first time at a lower sum, and it would require 40 years' overpayment after 1863 to establish any right to overpayment in the benefice.

"The action of valuation was brought for the very purpose of fixing the exact value of the teinds, and to give the heritor the right to draw his own teinds. Supposing that the teinds had been actually drawn prior to 1863, the drawn teind would always exceed in amount the valued teind, and the valuation was brought for the very purpose of reducing it to its true and actual amount.

"Still farther, in a process of valuation the teind is struck at one-fifth of the net teindable rental as at the date of the valuation. Now it may very well be that the teindable rental of the lands of Aigas had fallen off between 1817 and 1863, so that while a fifth of the teindable rental in 1817 was £40, the fifth of the teindable rental in 1863 might be only £32, 2s. 6⅘d. The minister is no more entitled to found upon the byegone high rental of the lands, as a reason for paying more teind than is actually due, than the heritor would be entitled to found upon that circumstance as a reason for drawing more rent than the lands will actually bring.

"Lastly, the Lord Ordinary thinks that the decree of 1863, being in point of fact unchallenged and unreduced, he must give effect to it in settling the final locality in the present process. It is just possible, though the Lord Ordinary does not think it likely, that 40 years' prescriptive payment prior to 1863 might have been a good defence in the valuation against the value being struck at a less amount. But this was not pleaded, and final decree of valuation was pronounced. The Lord Ordinary cannot by way of exception set aside the final decree of valuation as he is now asked to do.

"The view now taken supersedes all the other questions raised on record. These questions relate chiefly to the years which must be reckoned in making up the prescriptive period, and in particular whether certain minorities are to be deducted, and whether the full sum was paid in certain other years. The question of minority is rather a difficult one, the absolute title being taken by the minor's tutors or curators in their own name, and the lands being so held by them for a time, and then conveyed to the minor. The Lord Ordinary inclines to think that as it appeared on the face of the title, though not in the dispositive clause, that the lands were really held for the minor, the exception of minority would apply. The present judgment does not, however, rest on this ground, but solely on the decree of valuation of 1863 as above explained.

"The Lord Ordinary has modified the expenses awarded, on the ground that the heritor has been unsuccessful in the discussion on the interim locality, the minister having succeeded in maintaining the interim locality at £40 per annum."

The minister reclaimed.

Authorities cited—1 Connell, 253, 458; *Madderty*, July 9, 1817, F. C. 371; *Baird*, 10 S. 752; *Locality of Row*, July 4, 1871; A. S. July 5, 1809; 1633, c. 15; *Magistrates of Edinburgh* v. *Learmonth*, 20 D. 202.

The Court adhered.

Counsel for Reclaimer—Watson and Trayner. Agents—M'Ewen & Carment, W.S.

Counsel for Respondent—Kinnear and Mackay. Agents—Murray & Falconer, W.S.

Friday, January 17.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

STEUART *v.* PADWICK AND STEUART.

Deathbed—Sale, Agreement of—Reduction.

A executed an agreement of sale of heritage and died twenty-five days afterwards. It was proved that at the date of executing the deed, and at his death, his heart was not free from disease, but that the immediate cause of death was conjestion of the lungs, arising from bronchitis, and not caused by, or connected with, disease of the heart. The Court *held* that when he executed the deed he was not labouring under the disease of which he died, and repelled the plea of deathbed.

This was an action brought by Sir Archibald Douglas Steuart, against Mr Henry Padwick and Mr Franc Nichols Steuart, for reduction of a minute or agreement of sale of the estates of Grandtully, Murthly, and Strathbraan, Perthshire, entered into between Mr Padwick and the deceased Sir William Drummond Steuart, on the ground that it was executed on deathbed. Sir Archibald Douglas Steuart raised the action as heir next called to the succession of the said estates in certain deeds of entail, and Mr Franc Nichols Steuart appeared as defender as universal disponee and executor to Sir William Drummond Steuart, in virtue of a deed of settlement executed by him. Sir William Drummond Steuart executed the said agreement of sale, by which he sold the estates to Mr Padwick for the sum of £350,000 on the 3d of April 1871, and he died on the 28th of April in the same year. The pursuer averred that at the date of execution of the deed Sir William Steuart was labouring under the disease of which he died, and therefore brought this action of reduction, on the ground that the deed was executed on deathbed.

A proof was led, the result of which will be seen from the Lord Ordinary's Note and the opinion of Lord Ardmillan.

The Lord Ordinary pronounced the following interlocutor and subjoined Note;—

"*Edinburgh, 30th May* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process—Finds that the late Sir William Drummond Steuart of Grandtully and Murthly died at Murthly on 28th April 1871: Finds it is not proved that, on 3d April 1871, being the date on which Sir William Drummond Steuart executed the minute or agreement of sale sought to be reduced, he was labouring under the disease of which he died; assoilzies the defenders from the conclusions of the libel, and decerns; Finds the defenders entitled to expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report.

"*Note.*—The deed sought to be reduced, being an agreement for the sale of the Murthly estates to the defender Mr Padwick at the price of £350,000, was executed by the late Sir William Drummond Steuart on 3d April 1871. He had spent several months of the preceding winter in Edinburgh, and he returned to Murthly in January 1871, where he remained until his death on 28th April 1871—that is, twenty-five days after the execution of the said agreement. While in Edinburgh Sir William went to consult Dr Warburton Begbie with reference to an affection of the urinary organs on 8th September and 18th November 1870. Dr Begbie, observing that the temporal artery was tortuous, that the radial artery, where the pulse is usually felt, was rigid, and that there was a marked *arcus senilis* below the eyes, examined his chest by means of the stethoscope, and was led to infer that the heart, though not enlarged, was somewhat feeble in its action, that there probably existed some little dilatation at the mouth of the aorta, which is not unusual in old people, and that the semi-lunar valves at the mouth of the aorta were then competent for their functions. Dr Begbie advised him to avoid exposure to cold and damp, as when degenerative change is in progress, such as he had detected in the vascular system, the nutrition of the body is impaired, and exposure to cold and damp is likely to prove a serious exciting cause of inflammatory disease, particularly in the lungs.

"During his stay in Edinburgh, and on his return to Murthly, Sir William continued apparently